

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
RECEIVED
JUN 24 1998

In the Matter of)

Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell Petition)
for Relief from Regulation Pursuant to)
Section 706 of the Telecommunications)
Act of 1996 and 47 U.S.C. § 160 for ADSL)
Infrastructure and Service)

Federal Communications Commission
Office of Secretary

CC Docket No. 98-91

**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 98-1111 (released June 11, 1998), hereby opposes the "Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA's resale carrier members, recognizing the need to provide their customers with a full range of service offerings, have been in the vanguard of competitive providers seeking to enter the local telecommunications market, as well as to broaden their service portfolios to include advanced telecommunications services. A year ago, a third of TRA's resale carrier members reported that they were providing, or attempting to provide, competitive local exchange service, while an additional third reported plans to enter the local market within twelve months. At the same time, roughly a quarter of TRA's resale carrier members reported that they were providing digital and broadband services. While the vast majority of TRA's resale carrier members continue to provide service, at least in part, on a non-facilities basis, half are at least partially switched-base and roughly a third are making some use of unbundled network elements in their provision of local telecommunications service. A majority of TRA's resale carrier members provide telecommunications services to residential, as well as business customers; indeed, more than a fifth of the local service customers served by TRA's resale carrier members are residential users. Sources: TRA, "1997 Reseller Membership Survey and Statistics," (Oct., 1997); TRA, "Member Survey of Local Competition," pp. 2, 4 (Apr., 1998).

and 47 U.S.C. § 160 for ADSL Infrastructure and Service" filed by Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (collectively, "Petitioners") in the captioned proceeding on June 9, 1998 (the "Petition"). As TRA will discuss in greater detail below, the Commission does not have the authority to grant the principal relief requested by Petitioners, and even it did, grant of that, as well as the secondary, requested sought by Petitioners would not be consistent with the public interest. Accordingly, TRA urges the Commission to summarily reject the Petition.

I. INTRODUCTION

Petitioners urge the Commission to relieve them of three key regulatory obligations imposed upon them by Section 251 and 252 of the Communications Act of 1934 ("Communications Act"),² as amended by Section 101 of the Telecommunications Act of 1996 ("Telecommunications Act").³ Specifically, Petitioners request that the Commission (i) relieve them of the Section 251(c)(3) network unbundling requirements applicable to the facilities and other infrastructure deployed to provide asymmetrical digital subscriber line ("ADSL") services, (ii) exempt them from the Section 251(c)(4) obligation to make retail ADSL services available for resale at wholesale rates, and (iii) free them from the Section 252(i) "most-favored-nation" obligation to the extent inconsistent with other relief granted herein with respect to ADSL facilities and services. Petitioners also urge the Commission to reclassify them as nondominant carriers in their provision of ADSL services. Unlike Bell Atlantic Corporation ("Bell Atlantic"), U S WEST Communications, Inc. ("U S WEST"), and Ameritech Corporation ("Ameritech") before them, Petitioners do not seek to be

² 47 U.S.C. §§ 251, 252.

³ Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

freed from the Section 271 restrictions on Bell Operating Company ("BOC") provision of in-region, interLATA services as they relate to ADSL services.⁴

Petitioners rely principally on Section 706 of the Telecommunications Act⁵ as the source of the authority they contend allows the Commission to grant the relief they request here, arguing that Section 706(a) permits the Commission to forbear from enforcing the requirements of Sections 251(c)(3) and 251(c)(4). Petitioners argue that with respect to their requested relief from dominant carrier regulation and application of Section 252(i)'s "most-favored-nation" obligations, they have made the showing required by Section 10 of the Telecommunications Act.⁶

II. ARGUMENT

Section 706 directs the Commission "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."⁷ Section 706(a) empowers the Commission to utilize in so doing, "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."⁸ It mandates, however, that the

⁴ See Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11 (filed January 26, 1998) ("Bell Atlantic Petition"), Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26 (filed February 25, 1998) ("U S WEST Petition"), and Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability, CC Docket No. 98-32 (filed March 5, 1998) ("Ameritech Petition") (collectively, the "BOC Forbearance Petitions").

⁵ 47 U.S.C. § 157 (note); Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996).

⁶ 47 U.S.C. § 160; Pub. L. No. 104-104, 110 Stat. 56, § 10 (1996).

⁷ Pub. L. No. 104-104, 110 Stat. 56, § 706(a) (1996).

⁸ Id.

Commission utilize these regulatory tools "in a manner consistent with the public interest, convenience and necessity."⁹ In furtherance of these directives, Section 706(b) requires the Commission to "initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans[,] . . . complete the inquiry within 180 days of its initiation," and if it finds deployment of such capability to be inadequate, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."¹⁰

Section 706 thus requires the Commission to assess in a public proceeding the adequacy of the deployment of advanced telecommunications capability, and if it determines that such capability is not being made available on a "reasonable and timely basis," to utilize the various regulatory tools at its disposal to accelerate such deployment in "a manner consistent with the public interest, convenience and necessity." Accordingly, as an initial matter, the Commission cannot, and should not, grant the relief sought by the Petitioners without first issuing a notice of inquiry, undertaking a comprehensive investigation, developing a full and complete record enhanced by broad-based public and industry participation, and adopting, if necessary, rules and policies which will not adversely impact competition.

Secondarily, the Commission lacks the authority to relieve Petitioners of their Section 251(c)(3) network unbundling and their Section 251(c)(4) resale obligations as they relate to ADSL facilities and services. As noted above, Congress authorized the Commission to utilize a variety of regulatory tools to speed the availability of advanced telecommunications services if necessary to accelerate the deployment of such capability. In so authorizing the Commission to act, however,

⁹ Id.

¹⁰ Id. at § 706(b).

Congress did not provide it with any new authority. Rather, Congress directed the Commission to use the regulatory tools at its disposal to achieve an identified end. Thus, Congress referenced the Commission's existing "price cap regulation[s]," as well as the "measures" it had directed the Commission to take to "promote competition in the local telecommunications market," as well as the new "regulatory forbearance" authority it had granted the agency in the Telecommunications Act.¹¹

The regulatory forbearance authority which the Commission can exercise to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" hence is not some undefined new power, but the regulatory forbearance authority granted the Commission in Section 10 of the Communications Act.¹² Certainly, Congress would not have taken the time to carefully craft, and circumscribe the Commission's use of, regulatory forbearance in Section 10, if it intended to grant the Commission unlimited regulatory forbearance authority in Section 706. It is well settled that statutory construction is "a holistic endeavor" and that various provisions of a statute must be read in harmony with one another.¹³ Here, the only reading that looks to the overall design, structure and purpose of the Telecommunications Act requires that the Section 706 reference to forbearance be viewed in conjunction with Section 10.

As the Commission is aware, Section 10 not only requires the Commission to make a series of determinations involving protection of consumers and the public interest, as well as the potential for unjust, unreasonable and discriminatory carrier conduct and the impact on competition

¹¹ Id. at § 706(a).

¹² 47 U.S.C. § 160.

¹³ U.S. Nat. Bank of Oregon v. Independent Inc. Agents of America, Inc., 508 U.S. 439, 449 (1993); United Savings Assn. Of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988); James Madison Ltd. by Hecht v. Ludwig, 82 F.ed 1085, 1093 (D.C.Cir. 1996), *rehearing en banc denied, cert. denied* 117 S.Ct 737 (1997).

of any act of forbearance, but it denies the Commission the authority to "forbear from applying the requirements of section 251(c) . . . until it determines that those requirements have been fully implemented."¹⁴ In denying the Commission this authority, Section 10(d) references "subsection (a)" because Section 10(a) is the only source of regulatory forbearance authority granted to the Commission and hence the only regulatory forbearance authority that must be limited.¹⁵

Congress' rationale for limiting the Commission's regulatory forbearance authority in this manner is manifest. As the Commission has recognized, the "overriding goal" of the Telecommunications Act is "to open all telecommunications markets to competition."¹⁶ In "enact[ing] the sweeping reforms contained in the 1996 Act, . . . Congress . . . sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents."¹⁷ To this end, Congress "require[d] incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three

¹⁴ Id.

¹⁵ Id. at § 160(d)

¹⁶ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543, ¶ 10 (1997).

¹⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 13 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 120 F.3d 820 (8th Cir. 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997), *pet. for cert. pending*.

methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbent's networks."¹⁸

Unbundled access to network elements at forward-looking economic cost and resale service availability at wholesale rates -- the two methods that do not require duplication of an incumbent LEC's network -- are designed to remove "the most significant economic impediments to efficient entry into the monopolized local market," enabling new market entrants to share "the economies of density, connectivity, and scale" which characterize incumbent LEC networks.¹⁹ As succinctly stated by the Commission, "the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market."²⁰ "Resale," the Commission has recognized, "will . . . be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled network elements."²¹

Accordingly, the Commission cannot, until the requirements thereof have been "fully implemented," forbear from enforcing Section 251(c) for purposes of speeding the deployment of advanced telecommunications capabilities or otherwise. As the Commission has elsewhere explained, "the Section 10(d) requirement means that the Commission must ensure that all the

¹⁸ Id.

¹⁹ Id. at ¶ 11.

²⁰ Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418, ¶ 195 (released Dec. 24, 1997).

²¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 907.

requirements of Section 271 are implemented before a BOC may offer interLATA service."²² Of course, among those Section 271 requirements are the duties imposed under Section 251(c).

Putting aside for a moment the Commission's lack of authority to grant the Section 251(c) relief Petitioners seek, the Petition raises the policy judgment of how best to achieve the myriad Congressional goals embodied in the Telecommunications Act – specifically, in this instance, opening the local telecommunications market to competition and ensuring the reasonable and timely deployment of advanced telecommunications capabilities. TRA submits that sequence is the critical issue here. Congress mandated an *immediate* elimination of all legal, regulatory, economic and operational barriers to local market entry, signaling that this was its highest priority; it directed at the same time that advanced telecommunications capabilities should be deployed "*on a reasonable and timely basis.*" In so doing, Congress recognized that the market forces generated by a competitive local market would drive the availability of advanced communications services. As Congress declared, the Telecommunications Act was intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*"²³ Thus, Congress "enacted . . . sweeping reforms" to "open local telecommunications markets to previously precluded competitors"²⁴ in order to facilitate the competitive provision of not only basic, but advanced, telecommunications services.

²² Petition for Declaratory Ruling Regarding US WEST Petitions to Consolidate LATAs in Minnesota and Arizona, 12 FCC Rcd 4738, ¶ 25 (1997).

²³ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") (emphasis added).

²⁴ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, ¶ 13 (1997).

Confirming the wisdom of the Congressional approach, Petitioners' track records, as well as those of other BOCs and incumbent LECs in deploying digital and broadband services has not been impressive. Deployment of Integrated Services Digital Network ("ISDN") by incumbent LECs has not only been slow and, until recently, geographically and demographically limited, but has proven exceedingly expensive for consumers. The technologies underlying such advanced telecommunications services as Digital Subscriber Line ("xDSL") service have been available for three decades. Yet it was not until competitors began entering the local market that incumbent LECs finally began making such services broadly available: indeed, no incumbent LEC offered xDSL service prior to last year.²⁵ The aggressive service deployment schedules, ambitious network construction plans and substantial facilities investment commitments announced by various BOCs and other incumbent LECs for advanced technologies and services have all post-dated market entry by competitive providers into the local market. In other words, actual and potential competition is driving, and will continue to drive, the deployment of advanced telecommunications capabilities.²⁶

²⁵ Petition at 21 ("Indeed, Pacific Bell has announced its intention to equip eighty-seven (87) central offices with ADSL in the very near future. . . . SWBT also expects to follow shortly with a deployment announcement of its own."); *see also* Bell Atlantic Petition at Att. 2, p. 12 ("The next generation digital technology is Digital Subscriber Line (xDSL). *With appropriate relief*, Bell Atlantic plans to deploy a variation of this technology -- asymmetric DSL, or ADSL -- that will offer speeds up to six megabits per second (Mbps) to its customers. . . . Bell Atlantic has completed *market trials* in Northern Virginia, and plans on rolling out commercial ADSL service to residential customers *beginning in mid-1998*. Bell Atlantic is also looking to deploy other varieties of xDSL *in the future*." (emphasis added, footnotes omitted); U S WEST Petition at 7 ("U S WEST recently announced the most aggressive roll-out of digital subscriber line services of any carrier in the country. . . . Sales of these services will begin *in April*." (emphasis added)).

²⁶ As the Commission has long recognized, competition, among other things, "promot[es] innovation and the efficient deployment and use of telecommunications facilities, . . . generat[es] increased research and development, and . . . positively affect[s] the growth of the market for telecommunications services." Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd. 18455, ¶ 10 (1996), *pet. for recon pending, pet. for rev pending sub nom. Cellnet Comm. v. FCC*, Case No. 96-4022 (6th Cir. Sept. 18, 1996).

Forbearance, therefore, is not the best means of speeding the deployment of advanced telecommunications capabilities. Regulatory efforts should instead be focused on fostering local competition through elimination of the many remaining obstacles to the competitive provision of local exchange/exchange access service. While competitive LECs have prompted and driven the increasing availability of advanced telecommunications services, their efforts in this regard are being hampered by incumbent LEC obstructionist tactics. Accordingly, if a wide array of advanced telecommunications capabilities are to be made broadly available at affordable rates in the foreseeable future, strong Commission action is required now to ensure that competitive providers have access to the network facilities and services necessary to continue to provide, and to expand their provision of, such services.

The mandate of Section 706 can best be met not by perpetuating local monopolies, but by facilitating the emergence of alternative sources of supply and the market pressures competitive providers create. Forbearance fosters the former;²⁷ Section 251(c) was designed to accomplish the latter.²⁸ The solution, then, is not to take regulatory actions that will be used to defeat competition and preserve monopoly bastions, but to compel compliance by the incumbent LECs with the market-opening mandates of the Congress and the Commission.

²⁷ Relieving Petitioners of their obligation to make advanced telecommunications capabilities available to competitors as unbundled network elements at forward-looking economic cost or advanced telecommunications services available for resale at wholesale rates would provide these monopoly providers with a vehicle to reconstruct their legally-embattled monopolies in the advanced sector. Using ADSL technology, Petitioners will be able to provide a variety of high-speed communications simultaneously over multiple and separable transmission paths using twisted copper pairs. The convergence of voice and data, and circuit switched and packet switched, traffic, could well render plain old telephone service obsolete in the near future. If Petitioners are not required to make ADSL facilities and service to competitors, the "bottleneck" will thus be resurrected for all practical purposes in a new, but no less, daunting form.

²⁸

Id.

Given the above, the secondary relief sought by Petitioners can be readily denied as well. Petitioners' request that they be relieved of certain Section 252(i) "most-favored-nation" obligations was contingent upon grant of relief from the market-opening obligation of Section 251(c)(3) and 251(c)(4) as applicable to ADSL facilities and services. Petitioners' request that they be reclassified as nondominant carriers in their provision of ADSL services facially fails to meet any of the Section 10 forbearance standards. As expressly recognized by Congress, the broad availability of advanced telecommunications services will derive from a robustly competitive marketplace for such services. And as discussed above, a competitive marketplace for advanced telecommunications services will result directly from the market pressures generated by the competitive provision of local exchange/exchange access services.²⁹ This being the case, forbearance from regulations designed to constrain the market power of those entities which retain virtually monopoly control of the "bottleneck" facilities necessary to provide basic and advanced telecommunications services at the local level cannot be said to "promote competitive market conditions," be "consistent with the public interest," or unnecessary to "the protection of consumers" or to ensure "just and reasonable" carrier conduct.³⁰

²⁹ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") (purpose of the Telecommunications Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*" (emphasis added)).

³⁰ 47 U.S.C. § 160.

III. CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to summarily deny the Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service .

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

Charles C. Hunter

Catherine M. Hannan

HUNTER COMMUNICATIONS LAW GROUP

1620 I Street, N.W.

Suite 701

Washington, D.C. 20006

(202) 293-2500

June 24, 1998

Its Attorneys.

CERTIFICATE OF SERVICE

I, Catherine M. Hannan, hereby certify that a true and correct copy of the foregoing document has been served by United States First Class Mail, postage prepaid, to the individuals listed below, this 24th day of June, 1998:

Robert M. Lynch
Durward D. Dupre
Darryl W. Howard
One Bell Plaza, Room 3703
Dallas, TX 75202

Ms. Janice Myles*
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554


Catherine M. Hannan

* Via Hand Delivery